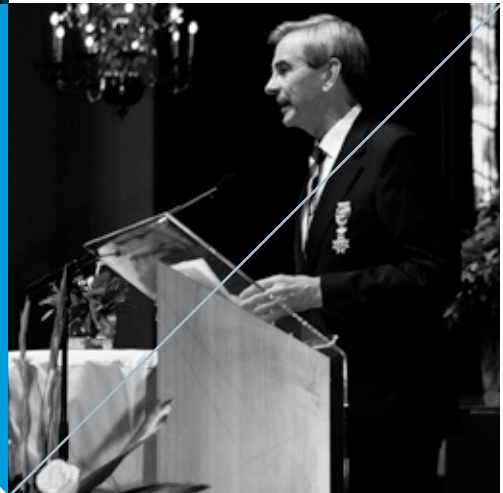




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Rechtspraaklezing 2007

The reflective judge

The judge in reflective mode



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# Editorial

The speech published below was delivered on the occasion of the official farewell to Bert van Delden as chairman of the Netherlands Council for the Judiciary in the New Church in The Hague on 23 November. The speech was delivered by Sir Igor Judge, President of the Queen's Bench Division of the High Court of Justice of England and Wales, a very close friend of Bert's.

Nomen est omen, as the old Latin saying goes. Whether this is true in this case is uncertain, but one could hardly imagine a better name for a judge. What is certain is that a man able to speak with such enthusiasm about his profession must have borne the proverbial burdens of office very lightly. Anyway, for those privileged to be among the audience this second Annual Lecture for the Judiciary proved to be a veritable feast for the ears.

To the text as spoken by Sir Igor Judge we have added some boxes providing information about the current situation in the Netherlands. We thought this appropriate in order to inform foreign readers about the context in which the Dutch audience will have understood the message brought to us.

The Annual Lecture for the Judiciary is intended to be – or rather become – a ritual moment for reflection on the judiciary and

the administration of justice in practice. In this respect, the topic could hardly have been closer to the mark. First, because it was a moment for reflection on Bert's contribution to the profession. During his presidency he put great emphasis on the importance of a professional attitude. This is indeed why we have added an English translation of a recent speech given by Bert on this issue. And, second, because in today's society every professional is required to show a capacity for reflection on a day-to-day basis. According to Bert, it's like our famous Dutch cartoonists say in their hilarious Fokke & Sukke cartoon strip: 'We simply must be more reflective!'

## The editors







**The Right Honourable Sir Igor Judge**  
**President of the Queen's Bench Division, England and Wales**

Sir Igor Judge was appointed the President of the Queen's Bench Division in October 2005 and Head of Criminal Justice.

Born on 19 May 1941, the son of Raymond and Rosa (née Micallef) Judge at King George V Hospital, Malta, he was educated in Malta at St Edward's College and in England at the Oratory School, Woodcote. He was awarded the Open Exhibition to Magdalene College, Cambridge in 1959 and graduated in History and Law in 1962.

Called to the Bar in 1963, Sir Igor had a very broad practice, mainly on the Midland and Oxford Circuit. He appeared in many major criminal trials, acting both for the prosecution and the defence. He also specialised in major personal injury actions, again for both plaintiffs and defendants. In 1979 Sir Igor was appointed Queen's Counsel (QC), and in 1987 was elected Leader of the Midland and Oxford Circuit. In that year he was also elected Bencher of the Middle Temple. He served on the Professional Conduct Committee of the Bar between 1980 and 1986.

Sir Igor was a member of the Judicial Studies Board from 1984 to 1988, serving on both the Criminal Committee and the Civil and Family Committee of the Board. He served twice as Chairman of the Criminal Committee of the Judicial Studies Board between 1990 and 1993, and again from 1996 to 1998.

Sir Igor's first judicial appointment was as a Recorder of the Crown Court in 1976. In 1988 he was appointed a High Court Judge of the Queen's Bench Division, a position which he held until his appointment to the Court of Appeal in 1996. During this period he served as Presiding Judge of the Midland and Oxford Circuit. Shortly after appointment to the Court of Appeal, Sir Igor was appointed the Senior Presiding Judge of England and Wales, a post he held from 1998 to 2003. In 2003 he was appointed Deputy Chief Justice, taking up his present appointment as the President of the Queen's Bench Division in October 2005.

# The reflective judge

## The Right Honourable Sir Igor Judge

### **You're always sitting on your own backside**

It is a privilege for me as an English judge to be addressing this distinguished gathering in such magnificent surroundings. 1648, when this church started being built, is a date of great significance to you here in the Netherlands.

It was in 1648 using the old method of calculating, when the year did not end on 31<sup>st</sup> December, that in England we removed the King's head from his shoulders in January, 1648 as it now is, 1649, and demonstrated that no one was above the law.

I should perhaps begin by pointing out that I was not born in England. Just as Bert van Delden was born far from your lovely country, I too was born abroad, in Malta during the war. I am only half English. My mother is Maltese. I was brought up in a household where England was much admired and indeed loved, but where no one pretended that the English commanded a monopoly of wisdom and goodness. I still remember that when my parents were arguing, and my mother started to become irritated, and she was after all a Mediterranean girl herself, she would turn to my sister and me, saying to us in strong terms to remember that we were only half English, and that the best half was the Maltese half. She also used to tell us, that we, meaning the Maltese, were civilised when Daddy, meaning the English, was covered in woad. Woad is war paint. Even as a child, I could not quite imagine my father ever covering his face in war paint, but I did get the message.

So I am not coming to The Hague to tell you how to do anything at all. That would be impertinence. I am coming to The Hague to pay my respects to an old friend, Bert van Delden, as he reaches retirement from his present distinguished post. I shall reflect a while with you on one judicial quality which never receives the attention it deserves. To be a good judge we need many attributes. We need to be intelligent, knowledgeable about the law but wise about the ways of the world, sensitive to others from different backgrounds to our own, fair and open-minded and balanced, independent in spirit, courageous to do what we believe to be right even when that will be unpopular, whether with politicians, the executive, or the media, but to all these ingredients and others, I highlight judicial modesty and judicial humility.



In this magnificent church I have not come to preach to you. If I wanted to preach I would ascend up to the pulpit. I want to talk about that vital quality, judicial humility, and the need for us as judges to remember how Montaigne put it in his great work, which I suspect is hardly ever read these days, at the end, when, he said:

*“no matter how high the throne on which you sit, you’re always sitting on your own backside”*,

although I suspect that in the original French he used a rather courser word than “backside”. The most powerful judges in the world may be the most powerful judges in the world, but they are and remain human beings, sitting on their own backsides, with the capacity for error, for mistake, for fallibility, that is part of our common humanity. No trumpets blow for judicial modesty and humility, but they are none the less noble judicial qualities shared by the best of judges.

No one exemplifies these characteristics better than Bert van Delden himself. Indeed he is not a man to blow his own trumpet. He is not a man to shout and draw attention to himself. But when he speaks you want to hear what he is saying. When he speaks you are listening to a man whose words do not obscure his meaning. When he speaks it is to get good things done, whether at home or in Europe generally, not to bask in self-glorification. Bert has had a remarkable career, and indeed he is not yet disappearing into that gentle goodnight of retirement. You will know all about his curriculum vitae, and it would be insulting to you for me to rehearse it.

In the end what matters about a man is the man himself. However distinguished his career, whatever his public reputation and fame, every man, and for that matter every woman, in the end has to live with himself, and with his own conscience. By that ultimate test, I am sure that Bert should be entirely at peace with himself.

### **Exercising judicial power**

The issue that I want to address is a profoundly important one to any individual exercising judicial power. And we have to face the fact, that that is what we are doing: exercising power. The power to lock up an individual, to deprive him of his liberty, even for 24 hours is a desperately important power. It has to be exercised with great circumspection. It demands not only intelligence, but integrity. All of us involved in the administration of justice are committed to a simple principle, that is that in every case before our courts, justice will be done according to law.

When I became a judge, I took an ancient oath that I would,

*“Do right to all manner of people according to the laws and usages of this realm, without fear or favour, affection or ill will.”*

Notice, do right – not wrong.

That oath reflects the aspiration of every judge in any civilised country, and it reflects his hope that every other judge sitting in his jurisdiction will have the same ambition. And yet, however determined we all are to ensure that justice is done, there have been, and there will continue to be occasions when justice miscarries. The evidence before the court may be incorrect, sometimes deliberately misleading and untruthful, sometimes just simply mistaken, but coming from an apparently convincing source or witness. Sometimes, too, acting in good conscience, the decision making body, that is the court, composed as it is of human beings, just gets it wrong. It is, of course, a miscarriage of justice if a guilty man is acquitted, but the most troublesome to all our consciences is the miscarriage of justice which leads to punishment and incarceration of a truly innocent individual. And I suspect that each and every such case is painful not only to those pre-eminently involved in it, that is those responsible for the erroneous decision, but it is painful to every judge, whose personal conscience is afflicted by the enormity of what has happened. Yet every judge knows that any error his colleague made today may be one he will make tomorrow. That is why we need judicial humility.

### **A safe conviction**

As you probably appreciate, our criminal justice system is very different from your own. In any serious criminal cases we have a system of trial by jury. The judge himself plays no part in the decision whether the defendant is to be acquitted or convicted. My experience has demonstrated that juries take their duties as seriously as professional judges do. They do their utmost to return what we call a true verdict according to the evidence. In our system, the pre-eminence of the jury means that the Court of Appeal does not interfere with their verdict unless there are good grounds for doing so. Unless there is fresh evidence, the grounds are almost always judicial error. That means that there is a public judgment, criticising the judge for the error. That is painful for him, but that, as the saying is, goes with the territory. That is the job. We cannot hide our mistakes, or expect a higher court to keep them hidden.

As judges we do not make the decision whether a defendant is guilty or not. That is exclusively the province of the jury. Actually that is not quite what a jury does. What it decides is whether the defendant is proved by the evidence to be guilty of the crime alleged. In the Court of Appeal we are never, or virtually never, considering whether the jury was right or wrong. We are considering whether there was evidence to justify the jury's conclusions. In particular we are not considering whether the defendant found guilty by the jury was guilty or innocent. We are only considering whether the conviction is safe. However, whatever the system, jury, judge alone, group of judges, mixed judge and jury, whatever the system, from time to time it produces an injustice and then within each system there is an appeal process, and in every system the process of appeal is different. Our appeal system requires the Court of Appeal to quash a conviction if we think that the conviction may be unsafe.

Notice this does not involve a conclusion that the defendant is in fact an innocent man. A conviction may be unsafe because the jury has been misdirected by the judge. It may be unsafe because the process which brought the individual to court was itself flawed, and the officers of state behaved in such a way that the rule of law itself was undermined. In other words, the system accepts that individuals who are truly guilty may nevertheless be entitled to have their convictions quashed. So it does not necessarily follow from a successful appeal, that the decision to quash the conviction means that a truly innocent man was convicted in the first place. It is enough that the conviction is thought to be unsafe. If it is, it must be quashed. We also have the power, and often exercise it, then to order a fresh trial before a new judge and jury. All the evidence is examined, the old and any new evidence, and the jury then returns its verdict.

### **Every system has its Kiszko cases**

Our processes have never been foolproof. There are a number of cases where evidence which emerges after trial may cast doubt not only on the safety of the conviction, but which shows that the defendant is and always was truly innocent. We have just been reminded of the shocking case of Stefan Kiszko. He was convicted of murdering a small child. He served 16 years in prison. Fresh evidence emerged at the end of that period of a scientific nature which demonstrated that, and I am paraphrasing a very long story, that one of the crucial pieces of evidence against him, sperm found on the child's underclothes could not have come from him. His conviction was quashed in 1991 or 1992. A few weeks ago, another man went on trial for the same murder. Basing itself largely on the developments in the science of DNA, the prosecution successfully established the link between him and the murdered child. Kiszko's conviction represented a terrible and desperately sad miscarriage of justice.

Every country, and every judicial system, has its Kiszko cases. Sometimes they will be just as high profile, sometimes less so. Any judge who asserts that his system of justice never has had its Kiszko cases is, with great respect, blind to the realities. With the best will in the world, no system is perfect. It cannot be.

**BOX 1**

*Committee for Evaluation of Closed Criminal Cases*

In recent years applications for the review of criminal convictions where the appeal process has been exhausted have been successful in three cases in the Netherlands: the Putten murder case (2001), the Deventer murder case (2003) and the Schiedammer Park murder case (2005). In the last of these cases a man was convicted of murdering a 10-year-old girl, but later proved to be innocent when the real perpetrator was found. These cases have had a major impact on both the prosecution service and the judiciary.

When it was argued during parliamentary debates on this subject that there might well have been more miscarriages of justice, the Minister of Justice and the Board of Procurators-General decided to establish a review committee. The function of the Committee for Evaluation of Closed Criminal Cases is to examine cases that are already closed, but might warrant further investigation because of possible flaws during either the original criminal investigation or the trial. For constitutional reasons, however, the role of the judiciary has been excluded from the committee's remit.

The committee consists of various advocates-general (senior prosecutors), criminal justice academics, former police officers, attorneys and former attorneys. The committee, which is chaired by Professor Buruma of Radboud University Nijmegen, advises the Board of Procurators-General on whether or not to review a case.

To date 36 cases have been referred to the Evaluation Committee. The committee has only advised to the Board of Procurators-General to reopen three of them.

Apart from anything else we are learning all the time. How many experts would have given evidence in 1490 that the world was round? Endless professors from Leyden University, Bert's alma mater, and Cambridge University, my own, would have come to tell the jury what their eyes tell them anyway. The earth was flat. Who on earth in any court in Europe in, say, 1550 or 1560, would have believed Copernicus and Galileo that the earth moved round the sun, not the sun and stars around the earth? They would have been laughed at. Indeed in Galileo's case, it was much worse. He was imprisoned. We now know that he was right. The story of human error is an old one. I sometimes wonder what special factors about the way we do things now in 2007, and what we believe to be plainly obvious; will be revealed as the years go by to have been wrong. But it is not just experts; it is every aspect of human life which is open to the possibility of error. It is an essential part of the human condition that we are fallible. The institutions created by and run by human beings are themselves subject to the same human fallibility.

And yet in court we still have to act on evidence. We cannot give our decisions based on some broad understanding of the potential for human fallibility. We are after all required to make a decision. We are in post and it is our duty to give judgment, not to avoid it, not to lack the necessary judicial courage to say what we think. We cannot be judges and evade our responsibilities. We cannot be judges and take the cowardly way out.

### **Criminal Cases Review Commission**

In England we first acknowledged the possibility of error in the criminal justice system relating to jury cases exactly 100 years ago this year. The Court of Criminal Appeal was created. I have touched briefly on its remit, as it currently stands. More important for recent purposes was the creation of the Criminal Cases Review Commission, exactly 10 years ago, in 1997.

It is important to remember that in our system the defendant was only permitted to use the process of appeal against conviction once. After that, he depended on the exercise of what used to be described as the Royal Prerogative of mercy. In practice, certainly since the beginning of the last century, that meant that there was a small department in the Home Office which was charged with examining convictions in the light of any fresh evidence that might become available. It was not a satisfactory process. The number of cases referred to the Court through it was very small.

The creation of the Commission publicly acknowledged not only the possibility of fresh evidence arising in any case, which is always a potential ground for appeal, but identified the body which should be properly resourced to exercise an independent function, in among other things, the examination of the actual evidence at trial as well as fresh evidence in close detail. In other words, every aspect of the investigation of the crime, and the trial process itself. The Commission resulted from some brilliant thinking at a time of great public concern arising from unsafe convictions following IRA atrocities. It was a time of great ferment. Not surprisingly, there was considerable public disquiet. There were some pretty strange ideas floating about, which largely consisted of setting up some new body, consisting of the great and the good (whoever they are), who would somehow be able to tell whether a conviction was safe or not, largely on the basis of what was being reported in the newspapers and on the television. That was not a very sound idea. It was not only judges who thought that that particular idea was not a very sound one.

Those who supported the idea of the new Commission, and this would be true of any such body created in any country, believe that it must be an independent body, independent of political or media pressure and altogether independent of judicial control. It cannot be the judiciary investigating the way the system operated in an individual case. But, at the same time, it could only be constitutionally acceptable if the Commission itself was given no power to take ultimate judicial decisions. These were to remain and do remain the exclusive responsibility of the Court of Appeal. That remains the only body vested with power to interfere with the verdict of a jury. Constitutionally the structure is impeccable.

So the Commission is not a court, although it operates within the statutory framework which governs the jurisdiction of the Court of Appeal. It is linked to the Court of Appeal in two ways. First, it can refer any conviction, however old, to the Court of Appeal whether or not there has been one or more unsuccessful previous appeals. It also is available to the court when we need help, when the case before us reveals reasons for concern which perhaps have not been fully investigated by the prosecution and/or the appellant, and we invite the Commission to conduct appropriate investigations.

**BOX 2**

*A new body is needed for the review of criminal cases*

The Criminal Division of the Supreme Court has proved to be unsuitable for reviewing criminal cases. At present, review is possible only if there is a new fact. This shelters judges from criticism. This is why Hans Croombag and others argue setting up a new review body like the Criminal Cases Review Commission.

One of the reasons why questions continue to be asked about some criminal cases is that the criminal division of the Supreme Court is bound in its decisions by a criterion that leads to rejection of most applications for review. (...) The criminal division of the Supreme Court may decide on a retrial where there are doubts about the finding of facts by the lower court. The Supreme Court is subject to a strict limitation in this respect: it can order a review only if a new fact has been found, in other words, a fact that was not known at the time of the previous hearing by the court of appeal and which might have led to a different decision. The consequence of this rule is that the judges are sheltered from criticism: they couldn't have done anything about it because they did not have all the information. (...)

The new facts criterion provides the lower courts with protection from the outset, and does not therefore provide a solution for cases in which the courts do not deserve this protection. A disquieting number of cases of this kind have been in the headlines recently.

As a result, the Committee for Evaluation of Closed Criminal Cases was established last year to reconsider such cases. But this committee too is subject to some unfortunate limitations. First of all, this is merely a temporary measure. (...)

But what is more important is that the Committee is also prohibited from expressing a view on the role of the district courts and courts of appeal in the cases it examines. It must confine itself to examining errors possibly made by the Public Prosecution Service, for example by suppressing exculpatory evidence or otherwise misleading the court. (...) As the Committee may not express any view on the degree of care observed by the courts in their work, it is by no means certain that it will be able to recommend a review in the cases now pending and that the social disquiet about these and similar cases will be removed. And there is also something else.

The question is whether we do not need a body which is able, when the need arises, to review criminal cases in their entirety, including the decisions of the courts up to and including the highest authority. Naturally, every criminal case must come to an end at some point; we cannot reconsider cases ad infinitum. But this is something which the criminal justice authorities do not entirely control. There are evidently certain cases that will continue to fuel public debate as long as we have not found a socially acceptable way of putting them to rest for good. This can be achieved if not only the Public Prosecution Service but also the courts can be brought to acknowledge and rectify their own manifest errors.

If we leave this to the Public Prosecution Service itself, there will always be a great temptation for it to gloss over its own mistakes (...). So self-assessment does not work. (...) Why should only judges be entitled to assess the functioning of judges? Judicial functioning is already assessed fairly regularly in the public domain, although this imposes no obligation on the judges and can therefore be easily ignored by them. There are cases that continue to fester and cause social unrest. This is to the detriment not only of those involved in them but also of society at large. And ultimately to the detriment of the judiciary too, which cannot do without social support indefinitely.

Hans F.M. Crombag is professor emeritus of forensic psychology at the University of Maastricht.

Han Israëls is lecturer in forensic psychology at the University of Maastricht.

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From NRC Handelsblad, 13/3/2007

There are a number of important features about the Commission which are worth underlining. Its responsibility is to consider and decide not whether a conviction is a safe conviction, but whether to refer a conviction to the court for the court to make that decision. The question for the Commission is whether there is a real possibility that the conviction will be considered unsafe by the Court of Appeal. That is crucial to our system, and I would suggest to any new Commission, or its equivalent in any country. In the end the decisions must be made by a court, and as I have said, in England, convictions returned by a jury can only be interfered with by The Court of Appeal.<sup>1</sup>

1 For present purposes, I shall not go into the system of appeals from Magistrates Courts, but the route is to a higher court, known as the Crown Court, and the Commission can refer convictions returned by Magistrates Courts to the Crown Court.

Appointment to the Commission is made by the Queen. That coincides with judicial appointment, and reflects the reality that the Commission has a quasi judicial function. On the other hand appointment to the Commission is not a permanent appointment. No one can serve on the Commission for more than 10 years, and some serve for less. The staff of course include lawyers to give advice, and one third of the Commission must be lawyers, and two thirds of them must have some experience of the criminal justice system. Every commissioner will have had different professional lifetime experience, an accountant, a nurse and former National Health Service Chief Executive, an investigative journalist, and the like. They are also men and women chosen not merely for their integrity, but for their independence of mind.

The Commission may refer a case where the appeal process has taken place and where, but for the Commission, it would effectively be exhausted.

What produces an unsafe conviction? I suppose ultimately this means that something has gone wrong somewhere along the process of investigation or trial itself. You can identify a number of factors for yourselves, but let me suggest a few examples.

- 1 Confessions to a crime which are later proved to be unreliable, whether because of unfair pressures exerted on the defendant, or indeed his inadequacy, neither of which were properly appreciated at the time.
- 2 Improper practice by the investigating authorities which only comes to light at a later stage.
- 3 Unreliable testimony by an apparently reliable witness. An example from a recent case where complaints of sexual misconduct, denied adamantly by the defendant, but on the face of them reliable, made by a young woman who subsequently made proved false complaints on other occasions, unearthed by the Commission. This of course did not prove she was lying about this particular case, but it meant that her reliability as a complainant in sexual cases was much more doubtful.
- 4 Flawed expert evidence, dividing itself into two areas. First, whether a crime was committed at all. For example, did the mother murder her babies, or was their death the result of natural, but as yet still unknown causes? In other words, Galileo again, in cases where the prosecution relied heavily on a world renowned authority in this particular field. It is hard to imagine a worse torture for a mother than to lose her babies through death and then find herself convicted and sentenced to imprisonment for life for having murdered them when she did not. The second is where there is no doubt the crime has been committed, but the expert evidence at trial no longer bears the weight which was attached to it.



Another recent example was the significance of a speck of gun fire residue found on the defendant's clothing. Those of you who watch any English television will know of the cold-blooded shooting of Jill Dando. New evidence suggests that the prosecution case attached more evidence to that speck of residue than it deserved. The conviction was therefore unsafe, and there will be a new trial.

The examples could continue indefinitely.

As you appreciate, the Commission is granted power to investigate the circumstances of a conviction in a totally independent role. If it decides that a conviction should be referred to the court, then it makes its own observations, and of course sends copies of its report to both the defendant and the prosecution as well as the court. Thereafter the defendant becomes the appellant, usually using the evidence and witnesses found by the Commission. Indeed on occasions, when the prosecution sees the results of the Commission's investigation, it immediately accepts that the conviction is unsafe.

One reason for requiring the Commissioners to be men and women of independent mind is that they receive well over 1000 cases from convicted defendants every year. Some of these defendants are professional criminals, and they are perfectly well able to put pressure on the Commission, or at any rate to try to. Some defendant's families will never accept his guilt, and they too, understandably if they believe genuinely that the defendant is innocent, will also try and apply pressure. In any one year the Commission refers to the court about 4% of the cases referred to it. So there has to be and there is a dispassionate objectivity in the way they go about their work. When a conviction is referred, over the last ten years, the Court has tended to quash about two thirds of the cases referred, leaving the convictions to stand in about one third. Mathematics is a dangerous master in this field, and we need to be careful about statistics. But, in the period 2006-2007 the convictions of 39 individuals were heard by the court, and 25 of them were quashed as unsafe. In many cases that is the end of it. In others there were or will be new trials, where the case will be investigated again, and it is reasonable to expect, and experience has shown, that often, but by no means always the new jury will return a conviction. But that conviction is safe whereas the first one was not.

But judges throughout our system, welcome the Commission's work. It is a hugely valuable weapon in the fight, yes fight, to avoid and prevent, but if necessary to admit and acknowledge, that a conviction thought to be safe at the time when it was returned, has turned out not to

be so. And as a court, we invite the Commission, because we have the power to do so, to conduct investigations at the behest of the court, where we have concerns about the quality of the work being done by either parties before us. The senior judiciary has complete faith in the integrity and quality of the work of the Commission which is carried out to the very highest possible standards. When, as judges, we say “thank you” to the Commission for its work, that is not simply a token gesture of gratitude.

That does not mean that we always agree with the Commission. That is simple to understand. The Commission exercises a different function to the court. As I have explained, they refer cases where there may be a real possibility that the conviction is unsafe, but we quash only those which we conclude are in fact unsafe. But whether we agree or disagree, as judges, both here, and at home, and in any civilised country, surely we should welcome light being thrown into any dark corners and indeed we do. And by doing so, we make it less likely that a truly innocent man who has been convicted will remain convicted of a crime he did not commit.

### **Public confidence in the Judiciary**

A very important question arises. It is perhaps best expressed in this way. Has the creation of the Commission damaged public confidence in the judiciary or indeed the jury system? That is a serious point – although surely no one could justify keeping a man in prison if he may not be guilty, simply in order to avoid damage to the public image and standing of judges and juries.

For what it is worth, and as far as I know there is no research on the subject, my strong impression is after a little understandable early excitement, the public has come to view the Commission as an integral part of the administration of justice – no more, no less. Like the trial judge himself, or the jury itself, it is now one of our safeguards – a new safeguard admittedly – but a safeguard against wrongdoing and error. As to the jury system, public confidence is unshaken. We retain an intuitive belief in the jury system. Criticise it, and we leap 800 years back to Magna Carta and what we regard as the immensely valuable concomitant of the jury system, which is the direct involvement in every serious case where the defendant pleads not guilty of twelve members of the public chosen at random to involve themselves in and be involved in their own criminal justice system. I am not here to explain the jury system, but I can assure you that the Commission’s work has not eroded public confidence in it.

**BOX 3**

*Public trust in the judiciary*

If the police, public prosecution service and judiciary do not carry out their duties properly or even make serious mistakes, it is reasonable to assume that public confidence in them will be adversely affected when these failings come to light. Public opinion surveys support this assumption. In Sweden, for example, confidence in the criminal justice system fell from 73% in 1981 to 56% in 1990. The researchers attributed this decline to the unsolved murder of prime minister Olav Palme in 1986. In Italy, the decline in confidence in the criminal justice system in the same period (from 43% to 32%) was blamed on the relative ineffectiveness of the steps taken by the criminal justice authorities to deal with the 'Red Brigade' and the resurgent Sicilian mafia. And in Belgium the decline in public confidence (from 58% to 45%) was attributed to political scandals and the Dutroux affair.

The next question is naturally how long does this negative effect last. Is it true that in time mistakes are forgotten and perhaps forgiven? Does this depend on how the organisation concerned responded publicly at the time in question? Is it not the case that a mistake is more likely to be forgiven and public confidence restored if the mistake was openly admitted and measures to prevent recurrence made public? As far as we know, no clear answer can yet be given to these questions on the basis of the survey findings. However, there are some indications. Although the murder of Olav Palme remained unsolved, Swedish confidence had risen again to 61% by 1999. In the same year, however, the Italian public were still as mistrustful as ever (32%) and, in Belgium, the decline continued unabated (1999: 34%).

The weakness of this interpretation is that it is based on measurements over a long period (in which all kinds of other effects can occur) and the respondents were different in each case. The panel survey of public confidence in the administration of justice conducted in the Netherlands in 2005 does not have any such weaknesses. The same questions were put to the same respondents on three occasions (April, September and December). By chance the case of the Schiedammer park murder was in the news in August and September of that year. As was the response of the Public Prosecution Service that followed. And what did the findings of the survey show? 45% had a lot of confidence in the criminal justice system in April, 37% in September and 43% in December.

**For closing**

May I end where I began. I have not come to preach, to tell you that what we do in England is perfect. Far from it. The issue for you is how you address this question here in the Netherlands. You cannot dig up a plant that grows in a foreign country, and examine its roots, and then stick it into a hole in the ground in your own. It will not flourish. How you address the question in the Netherlands depends on your history, your history as a nation, the route which took you from where it all began to where you are now. It involves your existing system for the administration of justice, and your own judicial structures. It would be utterly presumptuous of me, who was not brought up to it, to attempt to tell you how you should plant a Commission, and what shape it should take. So I have not done so. You must choose the plant, which must be suitable for the ground in which you hope it will grow.

My objective has been to stimulate your own thoughts about these issues by offering you a few tentative thoughts from across the Channel. As we say farewell to Bert, a man, a great man, who would have adorned the judicial system of any civilised country but who is, at it happens, an ornament of your own.



**Mr. A.H. van Delden**  
**Chairman of the Netherlands Council for the Judiciary**

He was appointed as chairman of the Netherlands Council for the Judiciary by January 1, 2002 when the Council was established. He will retire by January 1, 2008.

- 1941 Born on 17 Augustus, Poerwokerto, Indonesia
- 1965 Leiden University  
Faculty of Law (LL.M)
- 1966 Tulane University  
School of Law (LL.M)
- 1966 Trainee for the judiciary  
law clerk district court Utrecht  
assistant public prosecutor D.A.'s office Amsterdam  
lawyer law firm Breda
- 1974 Judge district court Utrecht
- 1980 Vice-president district court Utrecht
- 1985 President district court Den Bosch
- 1990 President district court The Hague
- 2001 Chairman of the Netherlands Council for the Judiciary
- 2004 Secretary General European Network of Councils for the Judiciary
- 1991 Member of the Board of the NAI (Netherlands Arbitration Institute)
- 1997 Vice-president of the Netherlands Helsinki Committee
- 1998 President of the Judges for Judges Foundation, The Hague
- 1999 Member of the Foundation for Alternative Dispute Resolution in  
business affairs.

Past president of the Dutch Association of Judges and Public Prosecutors  
Past member of the State Commission for the reform of the organization  
of the judiciary.

# The judge in reflective mode<sup>1</sup>

## Bert van Delden

It is quite popular nowadays to compare the judiciary to an oyster. Now tastes differ very much: some regard oysters as a great delicacy, while to others they are just a mouthful of seawater that they would prefer to leave on the plate. In all cases, however, the culinary comparisons all refer to the open oyster, while when talking about the judiciary we are thinking of the proverbial silence of the closed oyster. In this talk, I would like to discuss the question whether the silence of the oyster might not have something to offer us after all. I had initially thought of taking this opportunity to draw your attention to the question of ‘dissenting opinions’ – a matter that was debated in the annual meeting of our association more than 30 years ago, in 1973. This would also have enabled me to touch on ‘the secret of the judges’ chamber’.<sup>2</sup> However, Wilhelmina Thomassen and Daan Asser have recently discussed this issue in Dutch Legal Journal (NJB) 2006/12, 498, p. 686 et seq. Hence, it did not seem so appropriate to return to this matter here. Nevertheless, I feel that I must point out that even as long ago as 1973 the majority view was that there should be room for a dissenting opinion, at all levels of the judiciary. Thus, even then judicial confidentiality was apparently not regarded as an absolute must.

It will do no harm to bear this in mind during our subsequent deliberations.

A second comment I would like to make is that, while much of what I am about to say could be applied to civil or administrative law without too much difficulty, I will actually be limiting myself to criminal law.

### **Judicial errors can never be entirely eliminated**

By its very nature, any verdict in criminal law is based on a judgment of probabilities. Incidental judicial errors – or judicial aberrations, if you will – must thus be regarded as normal, even inevitable phenomena, at least in statistical terms. They are to be expected as the consequence of the imperfect nature of the investigations, procedures and (evaluation) processes that go to make up a criminal trial. That is not the view held by society, however.

1 This is a slightly revised and translated version of the article earlier published in: NJB nr. 26 2006, p. 1413-1417.

2 In the Netherlands, judgements from full bench panels are always rendered unanimously, after discussion behind closed doors. Dissenting opinions are never made public. We call this the Secret of the Judges’ Chambers.

The ordinary man will in general be unable to grasp the nature of judicial errors or aberrations, and will consequently regard them as unacceptable. In situations where the media chooses to make itself the mouthpiece of the common man, there is then a great tendency from the emphasis to shift away from the merits of the specific case to questioning the legitimacy of the entire system of criminal law.

In such cases, the main point of consideration is what is known in allied disciplines as false positive statements: the accused is found guilty, while it turns out later that he did not actually commit the crime. It is striking that much less attention is paid to the equally inevitable mirror image of this, the false negative (the accused is acquitted, while he did actually commit the crime). I believe, however, that there is little reason to draw much of a distinction between these two types of error when considering public confidence in, and the quality of, the judicial system. After all, the acquittal of a murderer who later goes on to become a serial killer will not leave public opinion cold either.

The legislator did realise that judges are also subject to error. For that reason our criminal legal procedures include a number of built-in safeguards to correct judicial errors: the right of appeal, to a limited extent the reversal of a judgment and to an even more limited extent judicial review. We assume that these measures are sufficient to deal with any errors that may occur, and the system does seem to work very well on the whole. However, some cases arise in practice in which an accused is initially sentenced to a long period of imprisonment but subsequently has the sentence overturned on appeal or after judicial review. It is sometimes established beyond reasonable doubt that the initial guilty verdict was incorrect and that the accused was in fact innocent. The natural reaction is to say that the whole thing was an unfortunate accident, most regrettable, but the system did work in the end. Pity for the prisoner, of course, but we will award him compensation and that's the end of the story.

### **Responsibility demands self-reflection**

In all honesty, I must say that I thought like that for a long time. I don't know what your feelings are in this matter, but I have been worrying about it increasingly for some time now. The fact that judgments in criminal law can display such wide divergences, and can sometimes be shown to be just plain wrong, raises questions. In practically all cases, these questions remain unanswered – even for the judges involved. There is no proper mechanism within the judiciary for dealing with such incidents. There are no external agencies that can examine them: the principle of judicial confidentiality precludes this. Thus, no thorough analysis is performed of the way in which the judge or judges involved came to the decision and of the factors that influenced the decision-making process. There is something unsatisfactory

about this situation. And not just because the public and the media would like full details of the issues involved, and do not get them. That is a separate issue, which I will not consider today. But it is also unsatisfactory from the perspective of the quality of criminal jurisprudence itself.

In its report *The future of the national Rule of Law* (2002) the Academic Council for Government Policy (WRR) asked the age-old question '*Quis custodes ipsos custodiet?*' (Who supervises the guardians themselves?). In this connection, the Council put forward the following view: 'As independent agencies that have been assigned a more central role under the Rule of Law concept, the judicial apparatus and the organization of jurisdiction may be expected to show that kind of transparency that is currently expected as a matter of course from other professional organizations. Just as a climate of openness and the statement of reasons for a given legal decision make it easier to assess the quality of such decisions, so can a transparent quality policy for the judiciary as a whole promote the external accountability of the guardians of the Rule of Law'.

The legislator has placed great power in the hands of judges. Such great power must be accompanied by at least an equally great responsibility. In order to live up to this responsibility, the judges must possess many different characteristics. I am convinced that the most important of these is self-awareness. Any judge who really wants to live up to the responsibilities imposed on him must be prepared to subject himself to critical self-examination when the circumstances permit this. By this I mean not only that an individual judge should place his own acts and motivations under the microscope, but that also that the members of a panel of judges should be prepared to examine the interaction between them. I believe that incidents like those described above give us every reason for further exploration of the possibilities of such examination.

I think that many judges in such situations would also like to look back on the trial and ask whether things could, or should, have been done better or otherwise. Was sufficient time allowed for preparation and for handling the case, did the people concerned have sufficient expertise or experience, was the preliminary investigation performed properly, had proper agreement been reached with the examining judge, were the deliberations of the panel of judges properly conducted, etc., etc.? But even more importantly, I am convinced that judges also want to know what they and the organization of which they form a part can learn from past cases that will help them to perform better in future. The judiciary does not possess such a structured form of self-reflection at the moment, however.



Please do not misunderstand me. I am not talking about looking for scapegoats with the aid of hindsight. Such an approach makes it impossible to concentrate on the lessons we need to learn for future use. Besides, in many cases no error will have been made at all or no error can be detected, quite apart from the question of identifying the person who might have been 'guilty' of committing this error. It will be clear, then, that there is no point in following that path. What I do advocate is that the Dutch judiciary should engage in more explicit, open and structured reflection on the lessons that might be learnt from incidents of the type we are discussing here. In brief, that both the judicial organization and the judges themselves should be more open to the need for and the advantages of self-reflection. Society must be able to trust its judiciary. A readiness on the part of the judiciary to discuss errors that might have been made can only contribute to this.

Easy to say, you might think, but under what circumstances should such an investigation be held, and what form should it take? Here are a few initial thoughts on this subject.

### **What is an incident in the sense we are considering here?**

I think that it is important to start by defining, as far as possible without making any implicit value judgments, exactly what kind of incident calls for self-reflection. It seems clear that in the first instance we can restrict ourselves to relatively major cases. A case in which the accused is wrongly fined for breaking the speed limit will not offend people's sense of justice as much as one in which someone is wrongly sentenced to a long period in prison.

A provisional point of departure could be to define an incident in the sense we are interested in here as *any situation in which different courts express widely differing opinions about the extent to which the guilt of the accused was proven and one of the trials ended in the handing out of a long unconditional prison sentence*. We are thus not considering here whether the opinions expressed were right or wrong, but simply making the objective observation that widely differing opinions were expressed.

It goes without saying in this connection that the exchange of judgments and sentences between the various courts involved should be better organized than it is at present. That is also a must from the viewpoint of the efficiency of the judicial system in general. Each pronouncement of a higher court should be seized on by the judges of the lower court in question as an invaluable immediate check on their performance, which could form the basis for an in-depth review. Since each pronouncement of a court is still – quite correctly – accompanied by the names of the judges who made it and of the clerk of the court, it should not be too difficult in this age of computers and E-mails to set up the necessary

meetings and procedures. Promising local initiatives in this direction have already been made here and there, but it could all be a lot more professional.

### **Investigation and self-reflection by the court involved**

Let us assume that we have an incident as provisionally defined above. How could we, or should we, investigate it? I will mention two possibilities here.

Internal examination with the aid of external advisors belonging to the judicial apparatus. The case currently known as the Schiedammer Park murder case has been independently reviewed by the involved District Court and the Court of Appeal. In view of the large amount of evidence involved, both investigations were supported by the same external advisors (a former president of a District Court and a vice-president of another Court of Appeal), but the approach used and the consequences of the review were different.

Apart from general findings, no details of the review have been made public. The principle of judicial confidentiality, which is applied very strictly in the Dutch legal system, did not allow this. In order to allow the external advisors to support the process of self-reflection, they had to be given special permission to obtain information on the in camera deliberations on the case. This was made easier by the fact that the two external examiners were both (former) judges themselves.

The administration of the court of first instance concerned asked all judges who had been involved in the original case to take part in the self-reflection process. They agreed to do so. Finally – with the permission of these judges – the general conclusions of the internal recommendations drawn up by the advisors were made public. The president of the court in question also published details of the review procedure used in *Trema* (the sixth-monthly journal of the Dutch judiciary, including the office of the Public Prosecutor). The court did not publish any further details of the review and its findings, partly because the internal investigation did not lead to any general conclusions. However, the president of the appellant court also published details of the self-reflection process in *Trema*.

There was quite a lot of criticism in the media about these investigations and the way in which the findings were (or were not) communicated to the outside world. In my opinion, this reaction is misplaced. It ignores the fact that this was a unique event in the history of Dutch jurisprudence. This was the first time that Dutch judges had a good look in the mirror, gave detailed account of their actions and permitted others who were not directly involved in the procedure to take a critical look at what had been going on. I see this as a real

turning point in the thinking within the Dutch judiciary, from which further developments may follow. Probably equally important is the implicit conclusion that the principle of judicial confidentiality does not have to be an absolute barrier for this. An advantage of this approach is that the investigation is kept within the judicial domain, so that the principle of judicial confidentiality does not hinder the investigation too much because the ‘outsiders’ who cast an eye on the handling of the case still come from within the judiciary. I believe however that it is vital that judicial observers from outside the court initially involved do play a part in the investigation, to prevent as far as possible the blindness to one’s own faults.

### **Investigation by an Incident Monitoring Committee**

A second possible way of investigating incidents is taken from another profession in which errors can have far-reaching consequences, that of medicine. Many hospitals around the world have for a number of years now had Incident Monitoring Committees (IMCs) with two main tasks:

- 1 investigation of the details of an incident and the factors that led up to it;
- 2 investigation of ways in which recurrence of similar incidents can be prevented.

A monitoring committee thus only makes statements about the avoidability of incidents and suggests possible improvement measures; it does not concern itself with the question of who was to blame. Moreover, its reports are not in the public domain. It seems incontrovertible to me that this greatly favours the openness of the internal dialogue. It may be noted by the way that hospitals are in a better position than the judiciary when it comes to not divulging the results of internal investigations, since in the latter case it is immediately known when an incident (in the sense we are discussing here) occurs and that an investigation will follow. An incident is reported to the IMC by departmental management, and the various departments are responsible for learning from the incidents they report. The IMC serves as a central monitoring point that collects information from the various departmental managements and investigates how patient safety can be improved throughout the hospital. It thus plays an important role as a motor for change.

This approach could be translated to the world of the judiciary by arranging for the presiding judge of each sector to report any incident that comes to his knowledge to a monitoring committee set up by the court. This could lead to further investigation along the lines sketched above and to the introduction of improvement measures.

It may be noted in this connection that not everyone in the medical world is happy with the idea of an IMC. There – I might almost say, there too – it is part of a difficult and painful

process of change. There is still a tendency among many physicians to be very hesitant about bringing possible medical errors into the open – even though it is stressed that the objective is not to spotlight what might have gone wrong but to see what can be learnt from it. It is very likely that judges – certain in the beginning – will react in much the same way.

The IMC model should thus not be seen as a solution to all our problems. It might nevertheless be useful considering whether it is not a worthwhile avenue for the judicial world to explore too. It goes without saying that the model would have to be adapted to suit it to the specific requirements of the judicial environment. It might also be possible to combine it with the first-mentioned approach so as to take advantage of the benefits of both. There will certainly be resistance to this idea, and it is to be expected that some will argue that it will weaken the powers of the judiciary. I am not so afraid of this, however. A thorough investigation rounded off with a well-balanced report and followed by appropriate measures can only strengthen the judicial system – even if errors have been made.

### **A public investigation?**

I mentioned the issue of judicial confidentiality at the start of my talk, and commented that this principle should not be considered as unalterable as the laws of the Medes and Persians. There is a problem here, however. The courts, quite unlike the medical world, always operate in the full light of public scrutiny. If we consider further that the ‘incidents’ to be investigated are all cases which have already attracted a great deal of public attention, then it is clear that not only those who were directly involved in the case but also the wider public will be aware that the matter is to be investigated. It is then very likely that claims will be made that the findings of the investigation should be published, and it may well be suggested in some circles that heads should roll. Such claims should be resisted. In its report, which I have already cited, the Academic Council for Government Policy stated that training courses, a life-long learning approach and specialization should be promoted in order to maintain and improve quality in the framework of the modernization of the judiciary. The Council added, ‘Since these quality-stimulating elements will be managed internally as an expression of the independence of the judicial system as a whole, it is reasonable to demand more transparency and systematic evaluation on the other hand, to satisfy the public demand for accountability’. I am deeply convinced, however, that the public should be satisfied with the knowledge that an investigation of the kind I have proposed is to take place. To demand more than this would not only compromise the integrity of our legal system, of which judicial confidentiality is – correctly, I believe – an integral part but would also most probably completely destroy the readiness of the members of the judiciary to take a new impartial look at the facts of a given case and learn from them which is the whole point of my proposal. It is vital that

the investigation should be carried out in a safe, no-blame environment, in line with the practice already established for IMCs. It might help to remind ourselves that magnificent pearls can grow in closed oysters.

I have already mentioned the issue of dissenting opinions, debated during the meeting of the NJV in 1973. Prof J. van der Hoeven was chairman of the association at that time. During his Annual Speech, he said, 'It is clear that in many cases a superior ability to view a matter in all its aspects, great expertise and experience and thorough, timely information are required if the proper decision is to be arrived at. This all means that the various positions [in the judiciary] must be filled by persons of excellent qualifications and great authority and leads, I believe, to the inescapable conclusion that the whole system stands and falls with the confidence placed in its bearers.' I agree whole-heartedly with Van der Hoeven's words. It goes without saying that that confidence must be earned – but it must not be continuously questioned and put under pressure in every possible way.

### **Concluding remarks**

I believe that a cultural change is needed before the idea of critical self-examination can become really popular. Judges must have a greater willingness and greater courage than they have had in the past to raise sensitive issues with their peers and their superiors (judicial hierarchy may not exist in theory, but certainly does in practice) – if anything threatens to go wrong, and must offer encouragement and coaching to less experienced colleagues. This is only possible in a climate of good professional leadership, but a built-in readiness to engage in self-reflection is equally indispensable. I have made a few suggestions about the form this process could take. But maybe Franz Kafka's words, 'roads come into existence because we follow them,' are applicable here. In other words, let's just get going on the road towards a better judiciary, and not wait until every inch of the way has been thought out and put down on paper.

De Rechtspraaklezing biedt jaarlijks iemand van binnen of buiten de juridische wereld de gelegenheid zijn of haar licht te laten schijnen over onderwerpen die betrekking hebben op de plaats of de rol van de rechtspraak in de samenleving. De lezing moet bijdragen aan de gedachtevorming over de ontwikkeling van de rechtspraak.

Want als er één ding vaststaat: de rechters kunnen het zich niet permitteren niet dagelijks reflectief te zijn.

## FOKKE & SUKKE

HEBBEN HET ALS RECHTERLIJK AMBTENAAR NIET MAKKELIJK

